No. 97-359

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

C.K. GREENWOOD,

Petitioner,

and

NATIONAL UNION FIRE INSURANCE CO. OF PITTSBURGH, PENNSYLVANIA,

Intervenor-Respondent,

vs.

SOCIETE FRANCAISE DE TRANSPORTES MARITIME and INDIAN OCEAN BULK CARRIERS, LTD.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONSE SUPPORTING PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the Court of Appeals misapply the doctrine of judicial estoppel to deprive the petitioner, Mr. Greenwood, of the right to plead alternative theories of recovery permitted by Rule 8(e)(2) of the Federal Rules of Civil Procedure?

2. Did the Court of Appeals violate the reexamination clause of the Seventh Amendment, and well-settled precedent, by substituting its findings of fact for those of the jury?

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STATEMENT OF THE CASE

I. District Court Proceedings.

C.K. Greenwood filed his complaint in the United States District Court for the Southern District of Texas, Corpus Christi Division, claiming personal injuries sustained on April 1, 1986, aboard the M/V PENAVAL, a vessel owned by Indian Ocean Bulk Carriers, Ltd. and Societe Francaise de Transportes Maritime. Greenwood's suit alleged vessel negligence predicated on 33 U.S.C. § 905(b). National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union") intervened to assert its workers' compensation lien for benefits paid to or on behalf of Greenwood under the Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.*

The case proceeded to trial with a jury on December 9, 1991, and resulted in a judgment favorable to Greenwood and National Union. The jury awarded Greenwood $264,000.00 in lost past earnings; $828,286.00 for loss of future earnings; $342,857.00 for past physical pain and suffering; $684,127.00 for future physical pain and suffering; $242,857.00 for past physical impairment; $642,857.00 for future physical impairment; $50,000.00 for past medical expenses; and $180,000.00 for future medical expenses.

The district court remitted the past loss of earnings to $253,000.00 and remitted the future loss of earnings to $775,000.00. The district court entered judgment for a total amount of $3,090,093.00. The district court further ordered that National Union recover the compensation and medical benefits paid to or on behalf of Greenwood

out of the proceeds of any funds paid in satisfaction of the judgment. Greenwood filed a Motion for Entry of Judgment, and the court entered judgment that Greenwood recover $3,090,093.00, plus post-judgment interest at the rate of 4.21% per annum and pre-judgment interest at the rate of 10% per annum. The court further ordered that National Union recover its lien. *See* Order Amending Judgment entered March 24, 1992, Appendix "A".

II. Proceedings in the Court of Appeals

The shipowners filed their Notice of Appeal on April 2, 1992. A three judge panel of the Fifth Circuit heard oral argument in January of 1993. On April 28, 1997, the panel entered its decision reversing and rendering in favor of the shipowners. The Fifth Circuit panel held by a two to one majority that there was insufficient evidence to sustain the jury's verdict of vessel negligence. The case of *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981) provides three different routes to recovery by longshoremen against shipowners for vessel negligence. Greenwood had advanced a theory requiring a showing of a hidden defect in the ship's crane and an alternative theory requiring a showing of an open and obvious defect. The Fifth Circuit panel held that there was insufficient evidence to support the verdict under either theory. In a curious footnote, the Fifth Circuit panel cited the doctrine of judicial estoppel as the bases for preventing Greenwood from pleading his theory of the case in the alternative. *Greenwood v. Societe Francaise De*, 111 F.3d 1239, 1248, n. 12 (5th Cir. 1997).

Greenwood timely filed a petition for panel rehearing and a suggestion for rehearing *en banc*. Both of these petitions were denied. Greenwood then filed a petition for a writ of certiorari in this Court. National Union files this brief in support of Greenwood's petition pursuant to Supreme Court Rule 12(6).

STATEMENT OF THE FACTS

Mr. Greenwood, a longshoreman, assisting in the discharge of cargo from the M/V PENAVAL, was struck by a hook attached to one of the vessel's cranes on April 1, 1986. The evidence at trial indicated that the ship's number four crane, the one involved in the accident, had a defective slewing brake which malfunctioned, allowing the crane to continue to move in a horizontal direction after the crane operator attempted to halt its movement.

The crane was operated by longshoreman Kenneth Logue from 7:00 a.m. to 8:00 a.m. and from 9:00 a.m. to 10:00 a.m. on the morning of the accident. Other crane operators operated the crane in one hour shifts when Logue was not working. The accident occurred a few minutes after 9:00 a.m., during Logue's second shift.

At trial, Logue testified that the problem in the slewing brake was apparent immediately after he began operating the crane at 7:00 a.m. The shipowners discredited Logue on cross-examination. They also presented six witnesses, all of whom were employees of the stevedore and were present working on crane number four at the time of the accident. Each of these witnesses testified that they knew of no problem with the crane at the time of the

accident and that any defect was hidden. Maintenance records maintained by the vessel described the condition of the slewing brake as "doubtful" prior to the accident.

On the date of the accident, Greenwood was employed as a longshoreman by Boyd Campbell Stevedoring, Inc. It is undisputed that Greenwood was injured during the course and scope of his employment aboard the M/V PENAVAL. National Union, as the longshore compensation insurer for Boyd Campbell, began paying compensation and medical benefits to or on behalf of Greenwood and continues to pay such benefits under an award pursuant to the LHWCA. National Union paid Greenwood compensation in the amount of $142,880.98 plus medical benefits in the amount of $50,932.70 as of December 3, 1991, and continuing. After Greenwood filed suit against the shipowners alleging negligence and breach of duty of care pursuant to Longshore and Harbor Workers' Compensation Act Section 905(b), National Union intervened to seek reimbursement for all compensation and medical benefits and a future credit out of the proceeds of any judgment or settlement.

ARGUMENT

I. The Court of Appeals misapplied the doctrine of judicial estoppel and prevented Greenwood from pursuing alternative theories of liability.

In footnote 12, the majority of the panel stated that "Greenwood could not procure a verdict and judgment on the basis of Logue's testimony and then on appeal seek to sustain that verdict and judgment by repudiating

that very testimony". The panel rested this statement on the doctrine of judicial estoppel. The court cited three cases standing for the proposition that "judicial estoppel prevents a party from asserting a position in a legal proceeding that is contrary to a position previously taken in the same . . . proceeding." 111 F.3d at 1248 n. 12.

The three cases cited by the court of appeals in its footnote 12 are readily distinguishable from this case. In *Ergo Science, Inc. v. Martin*, 73 F.3d 595 (5th Cir. 1996), the court found the claimant was judicially estopped from claiming entitlement to interpleaded funds based on its counsel's previous representation during the court hearing. In *Ergo*, the claimant deposited funds in the court as part of an interpleader proceeding. Counsel for the claimant specifically told the district court that the claimant no longer had any interest in the interpleaded funds. After the district court issued an order stating that all parties disclaimed any interest in the interpleaded funds, the claimant filed a Federal Rule of Civil Procedure 60(b) Motion for Relief from the Judgment, arguing that the district court was mistaken in its conclusion that the claimant had waived all claims to the funds. 73 F.3d at 596.

The issue on appeal was whether the district court could rely upon the statements made by counsel in open court disavowing any interest in the interpleaded funds. The court found that the claimant was judicially estopped from claiming the funds based on his attorney's statements in open court. The court noted that use of the doctrine of judicial estoppel prevents internal inconsistency, precludes litigants from "playing fast and loose" with the courts, and prohibits parties from deliberately

changing positions based upon the exigencies of the moment. 73 F.3d at 598. The purpose of applying the doctrine of judicial estoppel in cases like *Ergo* is "to preserve the sanctity of the oath by demanding absolute truth and consistency in all sworn positions." *Bates v. Long Island Railroad Co.*, 997 F.2d 1028 (2nd Cir. 1993), *cert. denied*, 510 U.S. 992, 114 S.Ct. 550 (1993).

In *In the Matter of Double D Dredging Company*, 467 F.2d 468 (5th Cir. 1972), there were two actions arising out of a single set of circumstances, a limitation of liability action and a Jones Act action. In the shipowner's Petition for Limitation of Liability, the shipowner claimed the vessel was working on the navigable waters of the United States and that the decedent was a seaman crew member within the meaning of the Jones Act. After the two actions were consolidated, the court denied limitation. During the ensuing trial of the Jones Act case, the shipowner maintained that the decedent was not a Jones Act seaman and that the vessel was not sailing upon navigable waters at the time of the alleged accident. 467 F.2d at 469. The court held that the shipowner was estopped from contradicting its sworn limitation petition at trial of the Jones Act case. 467 F.2d at 469-470.

In *Scott v. District of Columbia*, 101 F.3d 748 (D.C. Cir. 1996), *cert. denied*, 117 S.Ct. 1824 (1997), the court stated that although plaintiffs could plead alternative theories of liability to the jury under Federal Rule of Civil Procedure 8(e)(2), recovery of damages could not be based on two inconsistent theories where one theory precluded the other or the theories were mutually exclusive. In the *Scott* case, the plaintiff drove into four parked cars in the early morning hours. Police officers arrived at the scene and

placed him in a police cruiser, but did not advise him he was under arrest. Scott was subsequently arrested and charged with DUI.

Scott sued the individual police officers who arrived on the scene for false arrest, malicious prosecution, abuse of process, use of excessive force to effect an arrest, assault and battery, and negligence. At trial, Scott testified that he did not believe he was under arrest at the accident scene but merely was being transported to the traffic division for administrative purposes. In closing arguments, Scott's attorney told the jury that Scott was not under arrest and that he "had every right in the world to get out of the car and walk away." *Id.* at 753. The court of appeals ruled, however, that some of the jury's determinations could *only* rest on a finding that Scott had been arrested at the accident scene. For example, the jury found the police officer was liable for false arrest and for use of excessive force in making an arrest, both of which necessarily required an arrest to have been made.

On appeal, for tactical reasons, Scott maintained the position that he had not been placed under arrest at the accident scene. The court found that for purposes of appellate review, the plaintiff could not have it both ways at once. The court stated as follows:

> If [Scott] was not under arrest for the purposes of the excessive force claim, then he cannot recover on his other claims on the theory that he was under arrest. Indeed, on appeal, Scott did not expressly assert that [the officer] arrested him. The plaintiff could not recover damages on

> separate theories for different claims where one theory precluded the other.

Id. at 753, citing *Brookhaven Landscape and Grading Co. v. J.F. Barton Contracting Co.*, 676 F.2d 516 (11th Cir. 1982).

This case is unlike *Ergo*, *Double D* or *Scott*. First, Greenwood's counsel did not abuse the sanctity of his oath. Neither did he make any statements in open court which he later sought to repudiate. He was simply arguing alternative theories of liability to the jury as authorized by Rule 8(e)(2) of the Federal Rules of Civil Procedure. Secondly, Greenwood did not argue a position at trial which was adopted by the court and then, on appeal, argue an inconsistent position. Greenwood presented at trial evidence of the defendant's breach of two of the three Scindia duties – the turnover duty and the duty to intervene. On appeal, Greenwood maintained his position that evidence was introduced at trial to support either theory and that the court properly charged the jury as to both theories. Finally, Greenwood did not seek an award of damages under both theories of liability. Rather, he maintained the jury's award should be upheld because there was sufficient evidence for the jury to find for Greenwood under either of two alternative theories.

II. The Court of Appeals substituted its findings of fact for those of the jury.

In *Scindia Steam Navigation Co. v. De Los Santos*, 451 U.S. 156, 101 S.Ct. 1614, 68 L.Ed.2d 1 (1981), this Court articulated the scope of a vessel's duty under Section 905(b) of the LHWCA. Vessel liability arises in three instances: (1) if on turning over the ship the vessel owner

fails to warn of hidden defects of which he should have known; (2) if an injury is caused by hazards under the control of the ship; or (3) if the vessel owner fails to intervene in the stevedore's operation when he has actual knowledge, both of the hazard and that the stevedore, in the exercise of obviously improvident judgment, means to work on in the face of it and, therefore, cannot be relied on to remedy it. *Pimental v. LTD Canadian Pacific Bul*, 965 F.2d 13, 15 (5th Cir. 1992), citing *Masinter v. Tenneco Oil Co.*, 867 F.2d 892, 897 (5th Cir. 1989).

As Judge Johnson stated in his dissenting opinion, this case turns on the first of the three bases for vessel liability outlined in *Scindia*. The jury found the shipowners were liable for Greenwood's injury. The Fifth Circuit reversed and rendered, partly because it concluded that insufficient evidence existed to indicate that any defect in the crane was "hidden." However, as Judge Johnson points out in his dissent, to réverse, the majority must have ignored substantial testimony that the defect in crane number four was not noticed by any other crew members. Further, the majority must also have disregarded the attacks on Logue's testimony by the shipowners and the maintenance records indicating a preexisting defect in the slewing brake.

In short, the Fifth Circuit majority selectively chose from the evidence, crediting some and disregarding the rest. Judge Johnson's dissent in this case is on the mark; Judge Johnson stated "[J]udging the credibility and believability of witnesses is the province of the jury."

The majority opinion of the Fifth Circuit panel exceeded its province. The sole role of the Court of

Appeals was to determine the existence of substantial evidence to support the jury's verdict. "[I]t is the function of the jury as the traditional finder of facts, and not the court, to weigh conflicting evidence and influences, and determine the credibility of witnesses." *Boeing Co. v. Shipman*, 411 F.2d 365, 375 (5th Cir. 1969), *reversed on other grounds, Gautreaux v. Scurlock Marine, Inc.*, 107 F.2d 331 (5th Cir. 1997) (*en banc*). There was ample evidence of record to support the jury finding of a hidden defect in the ship's crane. By substituting its judgment for the judgment of the jury the Court of Appeals committed reversible error.

III. National Union adopts Greenwood's arguments.

In all other respects, National Union adopts the arguments contained in the Petition for Certiorari filed by C.K. Greenwood. This court should grant the writ of certiorari, reverse the Court of Appeals and reinstate the judgment of the district court in favor of Greenwood and National Union.

CONCLUSION

This Court should grant the petition for writ of certiorari, reverse the Court of Appeals, and restore the judgment of the district court.

Respectfully submitted,

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